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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 729

DANIEL W. O'DONOGHUE

vs.

THE UNITED STATES.

No. 730

WILLIAM HITZ

vs.

THE UNITED STATES.

PLAINTIFFS' MEMORANDUM.

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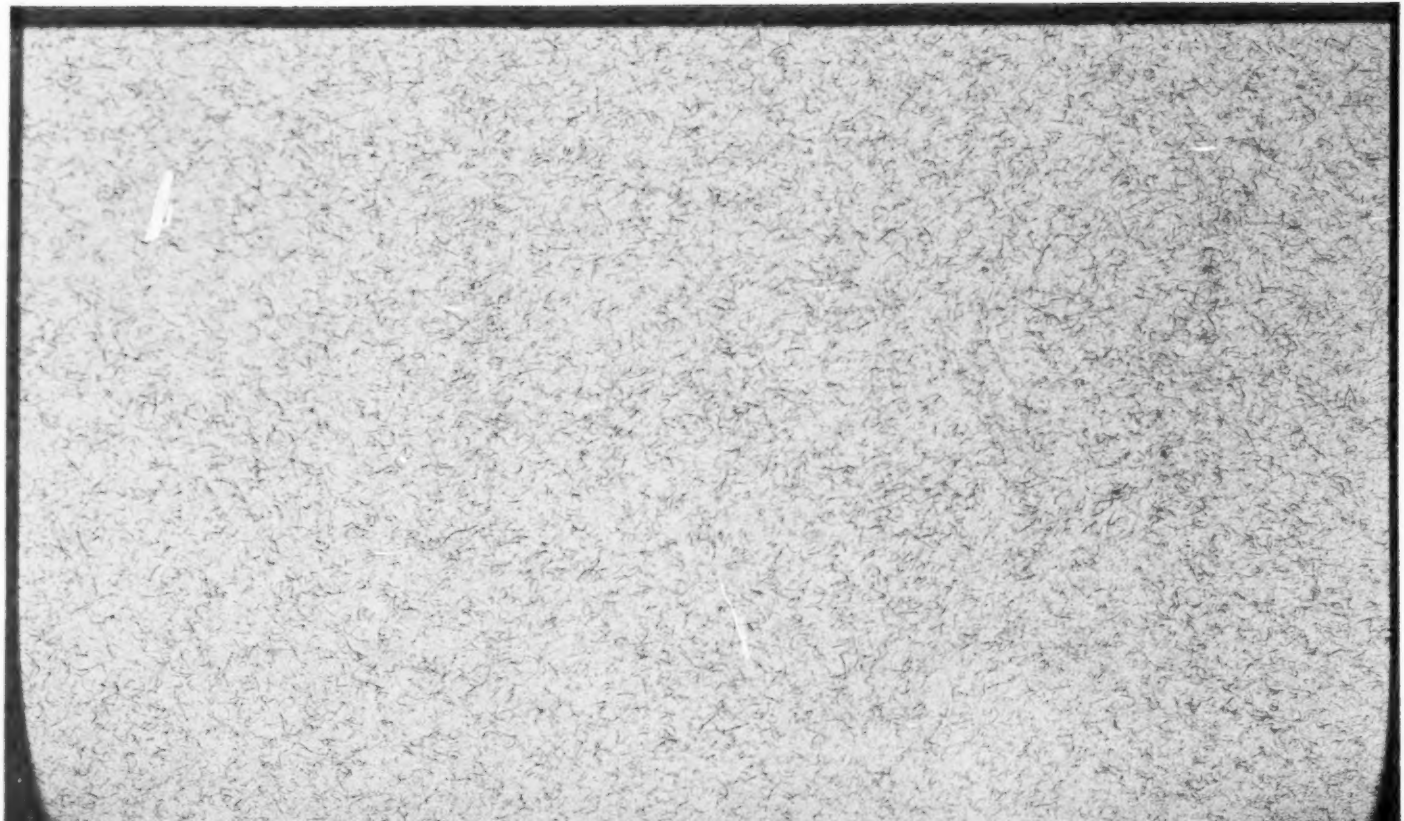

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PLAINTIFFS' MEMORANDUM ON THE EARLY LEGISLATIVE HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA.

By the act of March 3rd, 1863 (12 Stat. 762), creating the present Supreme Court of the District of Columbia, its powers and jurisdiction are defined in terms of the powers and the jurisdiction exercised by

its predecessor, the old circuit court of the District of Columbia. It is, therefore, the true lineal descendant of that court and by the character of its ancestor its character as a legislative or constitutional court may be judged.

Prior to the removal of the seat of the National Government to the banks of the Potomac the citizens of Maryland and Virginia residing within the area thereafter ceded to Congress possessed the same rights under the Constitution as their fellow citizens of the several States, including what might be described as the right to apply to a constitutional court in matters involving the judicial power of the United States, and to have their controversies of a Federal nature adjudicated by judges appointed for life and whose compensation could not be diminished during their term of office. They like all other citizens of the United States were entitled to have their constitutional rights determined by a tribunal whose independence was secured by no lesser guaranties.

This memorandum proposes to enumerate briefly the inferior courts successively provided by Congress for the exercise of the judicial power of the United States over the territory taken for the seat of the National Government. Keeping in mind the constitutional rights of the citizens residing in that territory to apply to some constitutional court or courts for the adjudication of their controversies involving the judicial power of the Federal Government, the legislative history of the courts of the District of Columbia may be stated as follows:

At the time of the passage of the Judiciary Act of 1789 the territory in question was still, of course, part of the States of Maryland and Virginia and the appropriate circuit and district courts created by that act for the districts of Maryland and Virginia had jurisdiction over the area soon to become the District of Columbia. This act provided in part:

> "SEC. 2. AND BE IT FURTHER ENACTED, That the United States shall be, and they hereby are divided into thirteen districts, to be limited and called as follows, to wit: * * * one to consist of the State of Maryland, and to be called the Maryland District; one to consist of the State of Virginia, except that part called the District of Kentucky, and to be called the Virginia District * * *"

> "SEC. 3. AND BE IT FURTHER ENACTED, That there be a court, called a District Court, in each of the aforementioned districts, to consist of one judge, who shall reside in the district for which he is appointed, and shall be called a District Judge, and shall hold annually four sessions, the first of which to commence as follows, to wit: * * * in the district of Maryland, alternately at Baltimore and Easton, beginning at the first; in the district of Virginia, alternately at Richmond and Williamsburgh, beginning at the first; * * *"

> "SEC. 4. AND BE IT FURTHER ENACTED, That the beforementioned districts, except those of Maine and Kentucky, shall be divided into three circuits, and be called the eastern, the middle and the southern circuit. * * * the middle circuit shall consist of the districts of New Jer-

> sey, Pennsylvania, Delaware, Maryland and Virginia; * * *, and that there shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum * * *"
>
> "SEC. 5. AND BE IT FURTHER ENACTED, That the first session of the said circuit court in the several districts shall commence at the times following, to wit: * * * in the district of Maryland, alternately at Annapolis and Easton, beginning at the first; in the district of Virginia, alternately at Charlottesville and Williamsburgh, beginning at the first; * * *"

"On the first Monday of December, 1800, the District of Columbia, by law, and in fact, became the seat of the Government of the United States. * * * On that day, therefore, * * * the District of Columbia became vested in the Congress and Government of the United States." (*U. S.* v. *Hammond*, 1 Cranch C. C. 15.) Although the assumption by Congress of exclusive jurisdiction over the area in question could not affect the constitutional rights of the persons therein residing since, as stated in *Downes* v. *Bidwell* (182 U. S. 244, 261), "the mere cession of the District of Columbia to the Federal Government * * * did not take it out of the United States or from under the ægis of the Constitution," nevertheless Congress very soon made a change in the forums exercising Federal jurisdiction over the territory. By the Act of February 13th, 1801 (2 Stat. 89), entitled "An Act

to Provide for the More Convenient Organizations of the Courts of the United States," twenty-two instead of the original thirteen districts were established with six instead of the original three circuits of the Judiciary Act. Among the new districts is found the district of Potomac created by Section 21 of the act, following:

> "SEC. 21. AND BE IT FURTHER ENACTED, That for the better dispatch of the business of district courts of the United States, in the districts of Jersey, Maryland, Virginia, and North Carolina, additional district courts shall be established therein, in manner following; * * * And a new district shall be established, in the districts of Maryland and Virginia, to consist of the territory of Columbia, of all that part of the District of Maryland which lies west and southwest of the river Patuxent, and of the western branch thereof, and south of the line which divides the county of Montgomery in the last mentioned district, from the county of Frederick, and of a line to be drawn from the termination of the last mentioned line, a northeast course to the western branch of the Patuxent; and of all that part of the district of Virginia, which lies north of the river Rappahannock, and east of the line which divides the counties of Fauquier and Loudon, in the last mentioned district from the counties of Fairfax, Prince William and Stafford; which new district shall be called the district of Potomac, and a district court in and for the same, shall be holden at Alexandria, by the district judge for the district of Maryland * * * which said courts, hereby directed to be holden, shall sev-

> erally and respectively have and exercise, within their several and respective districts, the same powers, authority, and jurisdiction, in all cases and respects whatsoever, which are vested by law in the district courts of the United States."

According to present geography, this district included the District of Columbia, the counties of Montgomery and Prince Georges, part if not all of Charles, and part of each of Anne Arundel and St. Marys counties, in Maryland, and the counties of Alexandria, Fairfax, and Prince William and part of Stafford County, in the State of Virginia. Organization of the court for this district was at least partially effected, not however by the district judge for the district of Maryland as provided in the act, but as will be seen by the chief judge of the Circuit Court of the District of Columbia.

Then came the act of February 27, 1801 (2 Stat. 103), creating the circuit court of the District of Columbia, providing:

> "SEC. 1. BE IT ENACTED * * *, That the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said state to the United States, and by them accepted for the permanent seat of government; and that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States, and by them accepted as aforesaid."
>
> "SEC. 2. AND BE IT FURTHER ENACTED, That the said District of Columbia shall be formed

into two counties; one county shall contain all that part of said district, which lies on the east side of the river Potomac, together with the islands therein, and shall be called the county of Washington; the other county shall contain all that part of said district which lies on the west side of said river, and shall be called the county of Alexandria; * * *."

"SEC. 3. AND BE IT FURTHER ENACTED, That there shall be a court in said district, which shall be called the Circuit Court of the District of Columbia; and the said court and the judges thereof shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States. Said court shall consist of one chief judge and two assistant judges resident within said district, to hold their respective offices during good behavior; any two of whom shall constitute a quorum; and each of the said judges shall, before he enter on his office, take the oath or affirmation provided by law to be taken by the judges of the circuit courts of the United States; and said court shall have power to appoint a clerk of the court in each of said counties, who shall take the oath and give a bond with sureties, in the manner directed for clerks of the district courts in the act to establish the judiciary of the United States."

"SEC. 4. BE IT FURTHER ENACTED, That the said court shall, annually, hold four sessions in each of said counties, * * *."

"SEC. 5. BE IT FURTHER ENACTED, That said court shall have cognizance of all crimes and offences committed within said district, and of

> all cases in law and equity between parties, both or either of which shall be resident or be found within said district, and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States."

It is clear that the "Circuit Courts of the United States" referred to in Section 3 of this act are the courts created by the act of February 13th, 1801, *supra*, as will be seen by the language of Thompson, J., in *Kendall* v. *U. S.*, 12 Peters 522:

> "And the power in the court below to exercise this jurisdiction, we think, results irresistibly from the third section of the act of the 27th of February, 1801, which declares that the said court, and the judges thereof, shall have all the powers by law vested in the circuit courts of the United States. The question here is, what circuit courts are referred to. By the Act of the 13th of February, 1801, the circuit courts established under the Judiciary Act of 1789 were abolished, and no other circuit courts were in existence except those established by the act of the 13th of February, 1801. * * * The question admits of no other answer than that it must be some existing law, by which powers are vested, and not a law which had been repealed. And there was no other law in force, vesting powers in circuit courts, except the law of the 13th of February, 1801."

A few days after the passage of the above act, Congress on March 3rd, 1801, passed an act supplemen-

tary to it (2 Stat. 115, Chap. 24), vesting in the Circuit Court for the District of Columbia certain powers theretofore vested in the county and levy courts of Maryland and Virginia "respecting constables, inspectors, and the inspection of tobacco and flour, surveyors, mills, highways and ferrys"; and providing among other things that the "circuit court for the said county of Alexandria shall possess and exercise the same powers and jurisdiction, civil and criminal, as is now possessed and exercised by the District courts of Virginia". While this statute represents an inpouring into the circuit court of the legislative power of Congress under Article I, Section 8, of the Constitution, there was passed on the same day an act (2 Stat. 123) which, as a clear reposition of the judicial power of the United States in the circuit court or at least in its chief judge, is of a more especial interest here. Section 7 of the act provides:

> "That the chief judge of the district of Columbia, shall hold the district courts of the United States in and for the district of Potomac, and shall have, exercise and perform, within the said district of Potomac, all the powers and duties now possessed, exercised and performed by the district judges of the United States within their respective districts."

Pursuant to this authority Chief Judge Kilty of the Circuit Court of the District of Columbia in April, 1801, just a few days before he opened the first session of the circuit court in Alexandria for that county of the District of Columbia, organized the district court for the district of Potomac, appointing George De-

neale clerk of the court and George Dent as marshal for the district. A session for admiralty purposes was then held, a record of which still remains. This court appears to have held only two terms, April and October, 1801, and as will be noticed, came to an end with the repeal of the act of February 13th, 1801, the succeeding year. At this period, therefore, the persons residing in the territory of Columbia for the adjudication of their controversies involving the judicial power of the United States were provided with two tribunals, the district court at Alexandria for the district of Potomac having jurisdiction not only of the territory of Columbia but of the contiguous counties as described above, and the Circuit Court of the District of Columbia exercising the jurisdiction of a United States circuit court but only within the limits of the national seat of government.

If the Circuit Court of the District of Columbia was not a constitutional court then there was no constitutional court (for circuit matters) exercising the judicial power of the United States within that area and the persons residing therein had lost their constitutional right to have their Federal controversies adjudicated by judges whose requisite independence was secured by the guaranties of the Constitution. That the Circuit Court of the District of Columbia was created by Congress in virtue of Article III, Section 1, of the Constitution as well as Article I appears from the fact that its chief judge was commissioned to hold the District Court for the District of Potomac in substitution of the district judge for the District of Maryland as first provided, and did actually hold an admi-

ralty session of that court. Inasmuch as the District of Potomac included territory over which Congress had no right of exclusive legislation as within the territory of Columbia, the District Court for the District of Potomac was unquestionably a constitutional court established under Article III, Section 1, of the Constitution; and accordingly such court could only be held by a judge appointed for life and whose salary could not be diminished during his term in office.

Ultimately, by Act of March 8, 1802 (2 Stats. L., 132), the Acts of February 13, 1801, and of March 3, 1801 (requiring the chief judge of the Circuit Court of the District of Columbia to hold the District Court for the District of Potomac as aforesaid), were severally repealed from and after July 1, 1802, and all the acts and parts of acts in force before the passage of the aforesaid two acts, and which by the same were either amended, explained, altered, or repealed were revived in as full and complete force and operation as if the said two acts had never been made. This act spelled the end of the short-lived court for the District of Potomac, at least so far as it included the contiguous counties lying outside of the District of Columbia limits and included in the old District of Potomac.

Before July 1st, 1802, the date on which the act of repeal of March 8th, 1802, was limited to take effect, Congress, anticipating the hiatus and defects in the judicial system which would result, passed on April 29th, 1802, "An Act to Amend the Judicial System of the United States" (2 Stat. 156), Section 24 of which provided:

> "That the chief judge of the District of Columbia, shall hold a district court of the United States, in and for the said district, * * *; which court shall have and exercise, within the said district, the same powers and jurisdiction which are by law vested in the district courts of the United States."

Other than this no provision was made in this act or in the repealing Act of March 8th, 1802, respecting the Circuit Court of the District of Columbia whose jurisdiction was defined in terms of the circuit courts of the Act of February 13, 1801, then legislated out of existence. It was soon held, however, that the repeal of the Act of February 13th, 1801, did not affect the Circuit Court of the District of Columbia:

> "Although the Act of February 13, 1801, was repealed by the Act of 1802, yet the repeal did not in any manner affect the powers or jurisdiction of this Court, given by the Act of February 27, 1801. * * * But so far as the extent of the powers vested in this Court by the act of that date is concerned, it is perfectly immaterial whether the reference in the third section of the Act is to the powers given to the circuit courts of the United States by the Act of the 13th of February, 1801, or by the Judiciary Act of the 24th, of September, 1789, for the powers are the same; * * * The Act of the 13th of February, continued in full force until the 1st of July, 1802. From the 27th of February, 1801, to the 1st of July, 1802, therefore, there could be no doubt as to the extent of the powers of this court; and the construction of the Act of the 27th of February, 1801, must be the same now as it was then, unless it

> has been altered by some act subsequently passed. None has since been passed, in any manner restricting the powers of this Court as they then existed. We still have, as we had then, all the powers which were by the 14th section of the Judiciary Act of 1789, vested in the circuit courts of the United States; * * * But none of our powers are derived from, or dependent upon, the Act of the 13th of February, 1801, or the Judiciary Act of 1789. The 3d section of the Act of the 27th of February, 1801, does not refer expressly to any particular act of Congress, but to the powers which were then, by law, vested in the circuit courts, and the judges of the circuit courts of the United States. * * * As the Act of the 27th of February, 1801, was not in any manner dependent on that of the 13th of February, the repeal of the latter could not affect the former." Cranch, J., in *Kendall* v. *U. S.*, 5 Cranch C. C. 163, 185, 252, 253 and 254.

On appeal to the Supreme Court of the United States, Thompson, J., in delivering the opinion of the majority of the court said:

> "The question (as to what law was referred to in the 3d section of the Act of the 27th of February, 1801) admits of no other answer than that it must be some existing law, by which powers are vested, and not a law which had been repealed. And there was no other law in force, vesting powers in circuit courts, except the law of the 13th of February, 1801. And the repeal of this law, fifteen months afterwards, and after the court in this district had been organized and gone into operation under

> the Act of the 27th of February, 1801, could not, in any manner, affect that law, any further than was provided by the repealing act." *Kendal* v. *U. S.*, 12 Peters 524, 625.

The Act of April 29th, 1802, was the last legislation materially affecting the Circuit Court of the District of Columbia for over thirty years. The later statutes of significance are noticed in the plaintiff's brief. The powers and jurisdiction of the Circuit Court passed by the Act of March 3rd, 1863, to the Supreme Court of the District of Columbia, establishing that court. If it be held that the present Supreme Court of the District of Columbia is not a constitutional court then neither was its predecessor; it would follow also that there is no constitutional court for the area of the United States known as the District of Columbia, nor has there been since the Act of February 27th, 1801, establishing the old circuit court. If then the persons residing in the District of Columbia, as also a great number of persons whose judicial controversies have their legal situs in the District, have lost their original right as citizens of the United States to apply to constitutional courts for the determination of their controversies involving the judicial power of the United States, then the question must be answered, at what time, and in virtue of what statute was that right lost. It is respectfully submitted that none of the Acts of Congress herein considered were so intended or should or can be given that effect.

In our main brief (pp. 44-45) we quoted the protest of Chief Justice Taney in 1863 against the reduction by taxation of the salaries of judicial officers. In 1869,

Attorney General Hoar (13 Op. A. G. 161) held that the tax was illegal and it was not further collected. Subsequently the Congress refunded to all of the justices of this Court the amounts deducted (*Wayne* v. *United States*, 26 Ct. Cls. 274-290). Similar refunds were made to the judges of the Supreme Court of the District of Columbia in 1872. This may be taken as a concurrence by the executive and legislative departments in the opinion of Chief Justice Taney not only that the deductions were unconstitutional but that there was no distinction between the judges of the Supreme Court of the District of Columbia and other Federal judges.

Respectfully submitted,

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